IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. KAUFMAN,

OPINION and ORDER

Plaintiff,

11-cv-168-bbc

v.

JEFFREY PUGH, CRAIG W. LINDGREN,
SANDRA COOPER, TERRY SHUK,
ISMAEL OZANNE, CAROL GARCEAU,
MARC W. CLEMENTS,
and RANDALL HEPP,

Defendants.

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In a June 14, 2011 order, I screened plaintiff James Kaufman's complaint in this case, which had been removed from state court by defendant prison officials, and explained that the complaint contained two lawsuits that could not be litigated in the same action. I gave defendants the opportunity to litigate both cases in this court by submitting another $350 filing fee, which they have now done.

In the lawsuit assigned this case number, plaintiff brings three sets of claims: (1) defendants Jeffrey Pugh, Craig Lindgren, Carol Garceau, Marc Clements and Ismael Ozanne

denied plaintiff's requests to form a study group for inmates who are atheists, in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), the First Amendment, Fourteenth Amendment and various sections of the Wisconsin Administrative Code and Stanley Correctional Institution policies; (2) defendants Lindgren and Randall Hepp denied plaintiff's request for a "knowledge thought ring," a religious emblem, in violation of RLUIPA, the First Amendment, Fourteenth Amendment, and various sections of the Wisconsin Administrative Code; and (3) defendants Lindgren, Terry Shuk and Sandra Cooper refused to make atheist books donated by plaintiff available to the inmates at the Stanley prison library, in violation of the First Amendment, Fourteenth Amendment, RLUIPA and various sections of the Wisconsin Administrative Code.

Because plaintiff is a prisoner, his complaint must be screened under 28 U.S.C. § 1915A. In performing that screening, the court must construe the complaint liberally. Haines v. Kerner, 404 U.S. 519, 521 (1972). However, it must dismiss the complaint if, even under liberal construction, it is legally frivolous or malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief.

As an initial matter, plaintiff has filed a motion to direct defendants to file a preliminary report pursuant to Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978) (en banc) (per curiam) ("In this circuit we allow a court authorized report and investigation by prison

officials to determine whether a pro se prisoner's allegations have any factual or legal basis.") I will deny this motion because it is not the practice of this court to require prison officials to prepare Martinez reports in prisoner civil rights cases, and at any rate, this case does not raise issues of factual or legal complexity that need to be addressed before screening of the complaint under 28 U.S.C. §§ 1915(e)(2) and 1915A.

Having reviewed the complaint, I conclude that plaintiff may proceed on his RLUIPA and First Amendment claims but I will remand his state law claims.

ALLEGATIONS OF FACT

Plaintiff James Kaufman was transferred to the Stanley Correctional Institution on September 17, 2009. On October 22, 2009, plaintiff submitted a request for a religious study group for inmates who are atheist. Other religious groups are allowed to meet in groups. Defendants Craig Lindgren, the chaplain, and Marc Clements, the deputy warden, recommended denial of the request because they did not view it as a "religious" request. The request was denied by defendant Warden Jeffrey Pugh. Plaintiff filed an inmate complaint and appealed it all the way to defendant Ismael Ozanne, the deputy secretary of the Wisconsin Department of Corrections. Ozanne dismissed the appeal.

On November 13, 2009, plaintiff submitted a "Request for Religious Emblem" form, requesting a "Knowledge Thought Ring," which is a sterling silver ring engraved with the

word "knowledge," as a symbol of his atheist belief system. Members of other religions are allowed to possess emblems or symbols. Defendant Lindgren denied the request, stating, "There is no Atheist Emblem in Religious IMP." Plaintiff filed an inmate complaint and appealed it to defendant Acting Warden Randall Hepp, who dismissed the appeal.

On December 24, 2009, plaintiff filed a second request for an atheist study group. Defendants Lindgren and Carol Garceau, a program director, recommended denial of the request because it was not religious in nature, and the request was denied by defendant Pugh. Plaintiff filed an inmate complaint and appealed it all the way to defendant Ozanne, who dismissed the appeal.

Since September 2009, plaintiff has either donated or arranged for the donation of "a number" of atheist books. Plaintiff sent written requests to Library Assistant Peterson as well as defendants Lindgren, Shuk and Cooper. Each of them responded by saying that donated books become the prison's property for use deemed appropriate by prison staff. No one told plaintiff what happened to the books. None of them were placed on the shelves, while "thousands" of Christian books were.

Plaintiff states that each of defendants' actions have "inhibit[ed] Atheism, while advancing theistic religious beliefs."

DISCUSSION

Plaintiff contends that defendants violated RLUIPA, the free exercise and establishment clauses of the First Amendment, the Fourteenth Amendment, various sections of the Wisconsin Administrative Code and Stanley Correctional Institution policies by (1) denying his requests to form a study group for inmates who are atheist; (2) denying his requests for a "knowledge thought ring"; and (3) by refusing to make atheist books donated by plaintiff available to inmates at the prison.

A. RLUIPA and Free Exercise Clause

Inmates alleging that government officials have impeded their ability to practice their religious beliefs have recourse to two different laws: the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, and the free exercise clause of the First Amendment. Under RLUIPA, plaintiff has the initial burden to show that he has a sincere religious belief and that his religious exercise was substantially burdened. Koger v. Bryan, 523 F.3d 789, 797-98 (7th Cir. 2008); Vision Church v. Village of Long Grove, 468 F.3d 975, 996-97 (7th Cir. 2006). A "substantial burden" is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

Plaintiff's atheism is the equivalent of a religion for the purposes of this analysis.

Kaufman v. McCaughtry, 419 F.3d 678, 681-82 (7th Cir. 2005) ("we have suggested in the past that when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for [him] occupy a 'place parallel to that filled by . . . God in traditionally religious persons,' those beliefs represent [his] religion.") (quoting Fleischfresser v. Directors of School District 200, 15 F.3d 680, 688 n.5 (7th Cir. 1994)); Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion."). Keeping this in mind as I construe plaintiff's complaint liberally, I conclude that plaintiff has alleged enough to state RLUIPA claims regarding the atheist study group and knowledge thought ring.

With regard to the claim that defendants would not make prison books donated by plaintiff available at the prison, I understand plaintiff to be bringing a claim solely on his own behalf. Although he alleges that the books were not made available to any of the atheist inmates at the Stanley prison, plaintiff does not name any other prisoners as co-plaintiffs in this lawsuit. (In any case plaintiff would not have been able to proceed on behalf of other inmates because he has not suggested that he is a lawyer licensed to represent others.) Because plaintiff alleges that defendants' withholding of books "inhibited [his] ability to study and practice Atheism," I conclude that plaintiff has stated a RLUIPA claim on this issue.

As this case proceeds on these claims, if plaintiff shows at summary judgment or trial

that defendants substantially burdened his sincerely held beliefs, the burden will shift to defendants to show that their actions further "a compelling governmental interest," and do so by "the least restrictive means." Cutter v. Wilkinson, 544 U.S. 709, 712 (2005). Also, plaintiff should be aware that he may not obtain monetary relief under RLUIPA. Nelson v. Miller, 570 F.3d 868, 883-89 (7th Cir. 2009).

Turning to plaintiff's free exercise claims, I note that they are generally governed by the standard from Turner v. Safley, 482 U.S. 78 (1987), which requires the court to determine whether the restriction is reasonably related to a legitimate penological interest. In determining whether a reasonable relationship exists, the Supreme Court usually considers four factors: whether there is a "valid, rational connection" between the restriction and a legitimate governmental interest; whether alternatives for exercising the right remain to the prisoner; what impact accommodation of the right will have on prison administration; and whether there are other ways that prison officials can achieve the same goals without encroaching on the right. Id. at 89.

In addition, some courts have suggested that courts must answer other questions as well, including: (1) whether the plaintiff's claim involves "religious" beliefs that are "sincere"; (2) whether defendants placed a "substantial burden" on the plaintiff's exercise of religion; (3) whether the plaintiff's claim involves a "central religious belief or practice"; and (4) whether the restriction targets the plaintiff's religion for adverse treatment or is a neutral rule

of general applicability. This court or the court of appeals has treated one or more of these issues as an element in some past cases brought by prisoners, e.g., Borzych v. Frank, 2006 WL 3254497, *4 (W.D. Wis. 2006) (requiring all of these elements), but in other prisoner cases at least some of the elements have been ignored. E.g., Ortiz v. Downey, 561 F.3d 664, 669 (7th Cir. 2009) (applying Turner without discussing other elements). See also Mayfield v. Texas Department of Criminal Justice, 529 F.3d 599, 608 (5th Cir. 2008) (applying Turner without imposing other requirements).

It is unnecessary to sort out in this screening order the exact standard to be applied. Construing plaintiff's complaint liberally, I conclude that he has alleged enough to state free exercise claims with regard to the atheist study group, knowledge thought ring and donated books, regardless which standard applies. The court of appeals has stated that district courts should wait until summary judgment to determine whether there is a reasonable relationship between a restriction and a legitimate penological interest because an assessment under Turner requires a district court to evaluate the prison officials' particular reasons for the restriction. E.g., Ortiz v. Downey, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding that it was error for district court to conclude without evidentiary record that policy was reasonably related to legitimate interest); Lindell v. Frank, 377 F.3d 655, 658 (7th Cir. 2004) (same). Accordingly, plaintiff may proceed on his claims that defendants violated his constitutional right to practice atheism.

B. Establishment Clause and Fourteenth Amendment

With respect to discrimination claims based on religion, the analysis is the same whether the claim is viewed under the establishment clause or the equal protection clause. Board of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 715 (O'Connor, J., concurring) ("[T]he Religion Clauses . . . and the Equal Protection Clause as applied to religion—all speak with one voice on this point."). The question is whether defendants singled out particular religions for special treatment without a secular reason for doing so. Cruz v. Beto, 405 U.S. 319 (1972); Kaufman v. McCaughtry, 419 F.3d 419 F.3d 678, 683-84 (7th Cir. 2005). The establishment clause of the First Amendment "commands a separation of church and state," Cutter, 544 U.S. at 710, by preventing the government from promoting any religious doctrine or organization or affiliating itself with one. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 (1989). A governmental policy violates the establishment clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion or (3) it fosters an excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Books v. City of Elkhart, 235 F.3d 292, 301 (7th Cir. 2000).

Applying Lemon, I conclude that plaintiff may proceed on an establishment clause claim regarding his study group; the court of appeals has already suggested in one of

plaintiff's previous cases that the denial of an atheist study group may violate the establishment clause, Kaufman, F.3d at 684 ("defendants have not answered [plaintiff's] argument that by accommodating some religious views, but not his, they are promoting the favored ones."). For similar reasons, plaintiff has also stated a claim regarding denial of the knowledge thought ring because he alleges that prisoners belonging to other religions were allowed to possess religious emblems, as well as a claim regarding the donated atheist books, because defendants continue to stock "thousands" of Christian books while refusing to stock the donated books.

C. State Law Claims

Plaintiff states that the denial of the religious study group, emblem and donated books also violates provisions in Wisconsin Administrative Code Chapter DOC 309 and local prison policies. However, I am not aware of any law stating that a violation of Wis. Admin Code chs. DOC 309 or prison policies may be enforced through a civil action, which means plaintiff's only possible mechanism for seeking relief is in state court by writ of certiorari. Kranzush v. Badger State Mutual Insurance Co., 103 Wis. 2d 56, 74-79, 307 N.W.2d 256, 266-68 (1981) (right of action to enforce statute or regulation does not exist unless directed or implied by legislature); Outagamie County v. Smith, 38 Wis. 2d 24, 34, 155 N.W.2d 639, 645 (1968) (with respect to laws that are not made enforceable by statute

expressly, action is reviewable only by writ of certiorari).

Other than a civil action, there is no parallel mechanism in federal district courts by which a plaintiff could obtain review of a state agency's actions to determine whether they conform with state law. Anderson v. Raemisch, 2009 WL 806588 (W.D. Wis. Mar. 26, 2009). As a general matter, federal courts have no business monitoring state agency actions under state law. Id. State courts have exclusive jurisdiction to hear writs of certiorari under the inherent power of the state judiciary to "determine whether another agency of the government has properly performed its legislatively delegated function." Outagamie County, 38 Wis.2d at 34. Accordingly, I will remand these claims to the Circuit Court for Chippewa County, Wisconsin. 28 U.S.C. § 1441(c) (district court has discretion to "remand all matters in which State law predominates" in cases removed pursuant to federal question jurisdiction).

ORDER

IT IS ORDERED that

1. Plaintiff James Kaufman's motion to direct defendants Jeffrey Pugh, Craig Lindgren, Sandra Cooper, Terry Shuk, Ismael Ozanne, Carol Garceau, Marc Clements and Randall Hepp to file a preliminary report pursuant to Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978), dkt. #10, is DENIED.

2. Plaintiff is GRANTED leave to proceed on the following claims:

a. defendants Jeffrey Pugh, Craig Lindgren, Carol Garceau, Marc Clements, and Ismael Ozanne denied plaintiff's requests to form a study group for inmates who are atheists, in violation of the Religious Land Use and Institutionalized Persons Act and the free exercise and establishment clauses of the First Amendment;

b. defendants Lindgren and Randall Hepp denied plaintiff's request for a "knowledge thought ring," a religious emblem, in violation of RLUIPA and the free exercise and establishment clauses of the First Amendment;

c. defendants Lindgren, Terry Shuk and Sandra Cooper refused to make atheist books donated by plaintiff available to the inmates at the Stanley prison library, in violation of RLUIPA and the free exercise and establishment clauses of the First Amendment.

3. Plaintiff's claims that defendants' actions violate Wisconsin Administrative Code provisions and internal prison procedures are REMANDED to the Circuit Court for Chippewa County, Wisconsin.

4. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of documents.

5. Pursuant to an informal service agreement between the Department of Justice and this court, the department has agreed to accept electronic service of documents on behalf of the defendants it represents. Therefore, for the remainder of this lawsuit, plaintiff does not

have to send a paper copy of each document he files with the court to the department. All he has to do is submit the document to the court, and the department will have access to the document through the court's electronic filing system. Discovery requests or responses are an exception to the electronic service rule. Usually, those documents should be sent directly to counsel for the opposing party and do not have to be sent to the court. Discovery procedures will be explained more fully at the preliminary pretrial conference, to be held after defendants file their answer.

Entered this 30th day of September, 2011.

BY THE COURT:

BARBARA B. CRABB
District Judge